Molly Margrete a/p Andrew Gomez v Tan Suat Ching & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 17–20–06 OF 2012
ZALEHA YUSOF J
4 APRIL 2013

Legal Profession — Solicitors — Discharge of solicitors — Discharge by client — Solicitor continuing to act for client despite discharge by client — Notice of change of solicitor not filed — Whether amounting to misconduct — Whether conduct unbefitting of an advocate and solicitor — Legal Profession Act 1976 s 94(3)(n) & (o) — Legal Profession (Practice and Etiquette) Rules 1978 r 16

Legal Profession — Disciplinary proceedings — Disciplinary Board — Whether properly conducted — Whether disciplinary board may amend orders made under s 103 of the Legal Profession Act 1976 — Whether unlawful addition of charge by Disciplinary Committee contrary to s 103B of the Act — Whether appellant denied her right to respond — Whether appellant prejudiced by respondent being allowed to speak in Chinese dialect without an interpreter

Legal Profession — Professional discipline — Misconduct — Solicitor continuing to act for client despite discharge by client — Notice of change of solicitor not filed — Whether amounting to misconduct — Whether conduct unbefitting of an advocate and solicitor — Legal Profession Act 1976 s 94(3)(n) & (o) — Legal Profession (Practice and Etiquette) Rules 1978 r 16

The respondent had appointed the appellant to act for her in a divorce proceeding in Kuala Lumpur High Court. However, on 4 October 2010, the respondent had instructed the appellant not to act for her any further and further instructed the appellant not to appear in court. Despite the instruction, the appellant continued to appear in court on behalf of the respondent on all dates set by the court. The respondent lodged a complaint against the appellant to the disciplinary board ('DB'). The DB subsequently fined the appellant RM3,000. The appellant filed this appeal, inter alia, on the following grounds: (i) that the DB failed to take into account that the appellant was at all times the solicitor on record for the respondent as she was not served with the notice of change of solicitor as provided by O 64 r 1 of the Rules of the High Court 1980 ('RHC'); (ii) that there were two orders in respect of one investigation which contravened the Legal Profession Act 1976 ('Act 166') as there is no provision in s 103 of Act 166 which allows the DB to amend orders made pursuant to that section; (iii) that there was inconsistency in the first order that in para (ii)

of the order, the DB had dismissed the second part of the complaint to wit the appellant had allegedly attended before the SAR on behalf of the respondent although the respondent had instructed her not to do so and yet in para IV of the order she was penalised when there was no date specified in para IV of that order and the complaint was dated 13 October 2010; (iv) that there was an unlawful addition of charge by the Disciplinary Committee contrary to s 103B of Act 166; (v) that there was a breach of natural justice as the appellant was denied her right to respond by the creation of a new charge; and (vi) that the appellant was prejudiced as the respondent was allowed to speak in a Chinese dialect without an interpreter.

Held, dismissing the appeal with no order to costs:

(1) The respondent had clearly indicated to the appellant, especially in a letter dated 15 October 2010 which the appellant admitted she had received, that the respondent instructed the appellant to discharge herself and not to appear in court any further. Hence, it was morally wrong for her to refuse to discharge herself and her act of continuing to appear in court again, clearly an act without regards of the client's interest and her conduct was a conduct which was unbefitting of an advocate and solicitor, contrary to the s 94(3)(n) and (o) of Act 166 (see para 6(f)).

(2) Even r 16 of Legal Profession (Practice and Etiquette) Rules 1978 requires her to uphold interest of her client. The said Rules were made pursuant to s 77 of Act 166 which clearly provides that failure to comply with any rule made under that section would make an advocate and solicitor liable to disciplinary proceedings (see para 6(g)).

(3) Just because no notice of change of solicitor was filed, did not mean that no disciplinary action could be taken against her, when it was so obvious she had acted contrary to her client's interest (see para 6(h)).

(4) The appellant was not prejudiced at all with the second order as it was to specify the charge she was found wanting. There was no error here or the appellant had not been misled as the appellant actually had admitted that she had continued appearing for the respondent even after the letter of the 15 October 2010 (see para 8(a)).

(5) The appellant's contention that there was an unlawful addition of the charge and that there was a breach of natural justice could not hold water (see para 10(b)).

(6) Nowhere in the notes of proceedings was there evidence that the respondent had given evidence in a Chinese dialect or objection by the appellant on that issue (see para 11(a)).

[Bahasa Malaysia summary

Responden telah melantik perayu untuk mewakilinya dalam prosiding penceraian di Mahkamah Tinggi Kuala Lumpur. Walau bagaimanapun, pada 4 Oktober 2010, responden telah mengarahkan perayu untuk tidak lagi mewakilinya dan seterusnya mengarahkan perayu untuk tidak hadir di mahkamah. Walaupun menerima arahan tersebut, perayu terus hadir di mahkamah bagi pihak responden dalam kesemua tarikh-tarikh yang ditetapkan oleh mahkamah. Responden membuat aduan terhadap perayu kepada lembaga disiplin ('LD'). LD kemudiannya mendenda perayu sebanyak RM3,000. Perayu memfailkan rayuan ini, antara lain, bagi alasan-alasan berikut: (i) bahawa LD gagal untuk mengambil kira yang perayu pada setiap masa merupakan peguamcara responden dalam rekod kerana dia tidak disampaikan dengan notis pertukaran peguamcara seperti yang diperuntukkan oleh A 64 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); bahawa terdapat dua perintah berkenaan satu penyiasatan yang bercanggah dengan Akta Profesion Guaman 1976 ('Akta 166') kerana tiada peruntukan dalam s 103 Akta 166 yang membenarkan LD untuk meminda perintah yang dibuat di bawah seksyen tersebut; (ii) bahawa terdapat ketidakselarasan dalam perintah pertama bahawa perenggan (iii) perintah, LD telah menolak bahagian kedua aduan iaitu perayu telah didakwa hadir di hadapan PKP bagi pihak responden walaupun responden telah mengarahkannya untuk tidak berbuat sedemikian namun dalam perenggan IV perintah tersebut, dia telah didenda apabila tiada tarikh yang dinyatakan dalam perenggan IV perintah tersebut dan aduan ditarikhkan pada 13 Oktober 2010; (iv) bahawa terdapat penambahan yang tidak sah dalam pertuduhan oleh Jawatankuasa Disiplin bertentangan dengan s 103B Akta 166; (v) bahawa terdapat pelanggaran keadilan asasi kerana perayu dinafikan daripada haknya untuk membalas dengan adanya pertuduhan baru; dan (vi) bahawa perayu diprejudis kerana responden dibenarkan bercakap dalam dialek Cina tanpa jurubahasa.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Responden telah dengan jelas menyatakan kepada perayu, khasnya dalam surat bertarikh 15 Oktober 2010 yang mana diakui diterima oleh perayu, bahawa responden mengarahkan perayu untuk melepaskan dirinya dan tidak hadir lagi ke mahkamah. Oleh itu, adalah salah di sisi moral untuknya enggan daripada melepaskan dirinya dan tindakannya yang terus-menerus hadir di mahkamah, jelas merupakan satu tindakan yang tidak mengambil kira kepentingan anakguamnya dan tindakannya adalah tindakan yang tidak bersesuaian sebagai peguambela dan peguamcara, bercanggah dengan s 94(3)(n) dan (o) Akta 166 (lihat perenggan 6(f)).

(2) Malah A 16 Peraturan (Amalan dan Etika) Profesion Undang-Undang 1978 memerlukannya untuk mengutamakan kepentingan anak guam. Peraturan tersebut dibuat di bawah s 77 Akta 166 yang jelas

memperuntukkan bahawa kegagalan untuk mematuhi mana-mana peraturan yang dibuat di bawah seksyen tersebut akan menyebabkan peguambela dan peguamcara boleh dikenakan prosiding disiplin (lihat perenggan 6(g)).

(3) Hanya kerana tiada notis pertukaran peguamcara telah difailkan, tidak bermakna bahawa tiada tindakan disiplin boleh diambil terhadapnya, sedangkan adalah jelas dia bertindak bertentangan dengan kepentingan anak guamnya (lihat perenggan 6(h)).

(4) Perayu tidak diprejudiskan sama sekali oleh perintah kedua kerana ia adalah untuk menyatakan pertuduhan yang didapati dimahukan olehnya. Tiada kekhilafan di sini atau perayu telah tidak tersalah arah kerana perayu telah mengaku bahawa dia telah terus hadir bagi pihak responden walaupun selepas surat 15 Oktober 2010 (lihat perenggan 8(a)).

(5) Hujahan perayu bahawa terdapat penambahan tidak sah ke dalam pertuduhan dan bahawa berlakunya pelanggaran keadilan asasi tidak terbukti (lihat perenggan 10(b)).

(6) Tiada mana-mana dalam nota-nota prosiding yang mengandungi keterangan bahawa responden telah memberi keterangan dalam dialek Cina atau mengenai bantahan oleh perayu dalam isu tersebut (lihat perenggan 11(a)).]

Notes

For a case on discharge of solicitors, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2080.

For cases on Disciplinary Board, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1486–1489.

For cases on misconduct, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1779–1857.

Cases referred to

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (folld)

Kirba Daisy a/p John Das v Mahinder Singh a/l Bachittar Singh [2012] 5 MLJ 712; [2012] 6 AMR 381, CA (refd)

Lagenda Kencana Sdn Bhd v Peter's Holdings Sdn Bhd & Anor [2012] 4 MLJ 855, CA (refd)

SPM Ramanathan Chettiar v Mplm Muthiah Chettiar & Others [1940] 1 MLJ 36 (refd)

Legislation referred to

Legal Profession Act 1976 ss 77, 94, 94(3)(n), (o), 103, 103B

Legal Profession (Practice and Etiquette) Rules 1978 r 16

Rules of Court 2012 O 64
Rules of the High Court 1980 O 64 r 1

Molly Margrete d/o Andrew Gomez (Molly M Gomez & Associates) for the applicant.
Kuan Chee Yoon (Arden Kuan & Co) for the respondent.
Avinder Singh Gill s/o Ranjit Singh (AS Gill & Salina) for the intervener.

Zaleha Yusof J:

[1] This is an appeal against the '4th part' of the order of the disciplinary board dated 12 April 2012 against the appellant which read:

> In respect of the 4th part of the complaint to wit that the Respondent had continued to act for the Complainant in the Kuala Lumpur High Court Divorce Petition No S8-33-193-2008 even though the Complainant had informed the Respondent to stop acting, the Respondent do pay a penalty of Ringgit Malaysia Three Thousand (RM3,000) payable to the Discipline Fund within one (1) month from the date of this Order, failing which the respondent shall be suspended pursuant to Section 103(1) of the Act from practice as an Advocate and Solicitor until payment of the penalty.

[2] The respondent had appointed the appellant to act for her in a divorce proceeding in KL High Court. However, on 4 October 2010, the respondent had instructed the appellant not to act for her any further and further instructed the appellant not to appear in court the following week that is on 12 October 2010. Despite the instruction, the appellant continued to appear in court on behalf of the respondent not only on 12 October 2010 but also on all dates set by the court thereafter. The respondent lodged a complaint against the appellant to the disciplinary board by a letter dated 13 October 2010 as follows:

(a) that she was issued with a bill for RM600,000 although the agreed fee was alleged to be RM6,000;

(b) that she had discharged the appellant on 4 October 2010 on the grounds that the appellant's fees were exorbitant and expressly instructed the respondent not to appear on her behalf on 12 October 2010; and

(c) notwithstanding the express instruction not to appear on 12 October 2010, the respondent appeared before the senior assistant registrar.

[3] The disciplinary committee heard the complaints and in its report had formulated the following charges against the appellant:

(i) That the appellant had verbally agreed to charge RM6,000 for acting for

A the respondent in KL High Court Divorce Petition No S8–33–1793 of 2008 but ended up issuing a bill for RM60,000 instead. (This part of the complaint dismissed).

(ii) That the appellant had attended before the senior assistant registrar of the
B High Court on behalf of the respondent on 12 October 2010 although the complainant had instructed her not to do so. (This part of the complaint dismissed).

(iii) That the appellant had during the court appearance before the senior assistant registrar on 12 October 10 acted to the respondent's detriment
C by agreeing to transfer complainant's 1/4 share in two houses to complainant's husband (the petitioner) despite the complainant's instructions not to consent to the petitioner's request. (This part of the complaint dismissed).

D (iv) That the appellant had purported to carry on acting for the complainant in KL High Court Divorce Petition No S8–33–1793 of 2008 even though the later had made it clear that the former's services were no longer required, (appellant to pay a penalty of RM3,000).

E **[4]** The disciplinary board accepted the report in its totality and fined the appellant RM3,000 on the fourth charge.

[5] The appellant's complaints in this appeal were based on the following
F grounds:

(i) that the disciplinary board had failed to take into account that the appellant was at all times the solicitor on record for the respondent as she was not served with the notice of change of solicitor as provided by O 64
G r 1 of the Rules of the High Court 1980 which is in pari materia with O 64 of the Rules of Court 2012.

(ii) that there are two orders in respect of one investigation which contravenes the Legal Profession Act 1976 (Act 166) as there is no provision in s 103 of Act 166 which allows the disciplinary board to
H amend orders made pursuant to that section.

(iii) further there was inconsistency in the first order that in para (ii) of the order, the disciplinary board had dismissed the second part of the complaint to wit the appellant had allegedly attended before the SAR on
I behalf of the respondent although the respondent had instructed her not to do so and yet in para IV of the order she was penalised when there is no date specified in para IV of that order and the complaint was dated 13 October 2010.

(iv) that there was an unlawful addition of change by the disciplinary

committee as the fourth part was not part of the complaint and no application to amend was made by the disciplinary committee; and this is contrary to s 103B of Act 166.

(v) that there was a breach of natural justice as the appellant was denied her right to respond by the creation of the fourth charge.

(vi) that the appellant was prejudiced as the respondent was allowed to speak in a Chinese dialect without an interpreter.

DECISION

[6] That the disciplinary board had failed to take into account that the appellant was at all times the solicitor on record for the respondent as she was not served with the notice of change of solicitor as provided by O 64 r 1 of the Rules of the High Court 1980 which is in pari materia with O 64 of the Rules of Court 2012.

(a) No doubt as referred by the appellant, that O 64 r 1 of the Rules of Court 2012 (or Rules of the High Court 1980) provides as follows:

> Order 64 r 1(1)
>
> A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until a notice of change is filed and served in accordance with this rule, the former solicitor shall subject to rules 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter.

(b) The appellant also refers to r 11–06 Rules and Rulings of the Bar Council Malaysia which, inter alia, read:

> (1) An Advocate and Solicitor on record is deemed, as between himself and the opposing party, to represent his client unless he has been discharged in accordance with the relevant rules of the Court concerned.

(c) The appellant also relies on the following decision to support her contention that she has locus to represent the respondent until the notice of change of solicitor is filed and served:

(i) *SPM Ramanathan Chettiar v MPLM Muthiah Chettiar & Others* [1940] 1 MLJ 36;

(ii) *Kirba Daisy a/p John Das v Mahinder Singh a/l Bachittar Singh* [2012] 5 MLJ 712; [2012] 6 AMR 381; and

(iii) *Lagenda Kencana Sdn Bhd v Peter's Holdings Sdn Bhd & Anor* [2012] 4 MLJ 855.

(d) I have no quarrel that the legal position is as long as there is no notice of change of solicitor is filed, the appellant is still the solicitor on record acting for the respondent. However, here we are looking at the 'misconduct' of the appellant as provided for by s 94 of Act 166. None of the cases cited by the appellant were decided under Act 166.

(e) Section 94(3)(n) and (o) of Act 166 clearly includes 'misconduct' of an advocate and solicitor as gross disregard of his client's interests and being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

(f) It cannot be disputed that the respondent had clearly indicated to the appellant, especially in a letter dated 15 October 2010 which the appellant admits she had received, that the respondent instructed the appellant to discharge herself and not to appear in court any further. Hence, it is in my opinion, morally wrong for her to refuse to discharge herself and her act of continuing to appear in court again after receiving the letter clearly an act without regards of his client's interest and her conduct is a conduct which is unbefitting of an advocate and solicitor, contrary to the said s 94(3)(n) and (o) of Act 166.

(g) Even r 16 of the Legal Profession (Practice and Etiquette) Rules 1978 requires her to uphold interest of her client. It must be noted that the said Rules were made pursuant to s 77 of Act 166 which clearly provides that failure to comply with any rule made under that section would make an advocate and solicitor liable to disciplinary proceedings.

(h) Therefore I cannot agree with the appellant that just because there is no notice of change of solicitor was filed, no disciplinary action can be taken against her, when it is so obvious she had acted contrary to her client's interest.

[7] That there are two orders in respect of one investigation which contravenes the Legal Profession Act 1976 (Act 166) as there is no provision in s 103 of Act 166 which allows the disciplinary board to amend orders made pursuant to that section.

[8] Further there was inconsistency in the first order that in para (ii) of the order, the disciplinary board had dismissed the second part of the complaint to wit the appellant had allegedly attended before the SAR on behalf of the respondent although the respondent had instructed her not to do so and yet in para IV of the order she was penalised when there is no date specified in para IV of that order and the complaint was dated 13 October 2010.

(a) I have scrutinised the two orders and I agree with the intervener that the second order clarified the first order. I am of the opinion that the appellant is not prejudiced at all with the second order as it was to specify

the charge she was found wanting. I do not find any error here or that the appellant had been misled as the appellant actually had admitted that she had continued appearing for the respondent even after the letter of the 15 October 2010. On the first order, even though no date was specified in part IV, and even though the first letter of complaint was dated 13 October 2010, there was a further letter of complaint dated 22 October 2010 at p 13 of encl 5 which said that the appellant had refused to discharge herself on 15 October 2010. To me, the appellant cannot now say that she was confused as she knew what she had done and that she has now to face to consequences of it.

[9] That there was an unlawful addition of charge by the disciplinary committee as the '4th part' was not yet of the complaint and no application to amend was made by the disciplinary committee; and this is contrary to s 103B of Act 166.

[10] That there was a breach of natural justice as the appellant was denied her right to respond by the creation of the fourth charge.

(a) It is clear from the notes of the proceedings before the disciplinary committee, the appellant, as mentioned earlier, had admitted to receiving the letter of 15 October 2010 and that she had already responded to it by her own letter dated 21 October 2010. And yet, without regard to her client's (respondent) instructions, she attended the court on 18 November 2010 and 17 February 2011.

(b) To me, what transpired after 12 October 2010 was also part of the complaints if we were to look at the second complaint of the respondent dated 22 October 2010 at p 13 of encl 5. The events after 12 October 2010 were submitted before the disciplinary committee proceeding and from the notes of proceedings I found that the appellant was given and had opportunity to address the matter. Hence, I am of the view that the appellant's contention that there was an unlawful addition of the charge and that there was a breach of natural justice cannot hold water.

(c) Refer to the notes of proceedings at pp 188, 193, 222 to 232 of encl 5.

[11] That the appellant was prejudiced as the respondent was allowed to speak in a Chinese dialect without an interpreter.

(a) On this, I have perused the notes of proceedings and nowhere could I find evidence that the respondent had given evidence in a Chinese dialect or objection by the appellant on that issue. There was also no objection or anything raised about this during submission made by her counsel.

CONCLUSION

[12] The Court of Appeal in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878 has said as follows:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honorable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behavior. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitor issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[13] Based on the authority and the reasons stated above, dismiss this appeal with no order as to cost.

Appeal dismissed with no order as to costs.

Reported by Kanesh Sundrum